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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-8

UNITED STATES OF AMERICA,

Petitioner,

vs.

HERMAN RADDATZ,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondent be allowed to proceed in forma pauperis before this Court.

Respondent was represented in the courts below by counsel appointed pursuant to the provisions of 18 U.S.C. §3006A.

Respectfully submitted,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Respondent respectfully prays that the petition for a writ of certiorari be denied.

QUESTION PRESENTED

When objections are made to a magistrate's recommended determination of a motion to suppress and an assessment of the credibility of witnesses is crucial to the resolution of dispositive factual issues, can the district judge, consistently with due process, decide the motion without seeing or hearing any witnesses?

ADDITIONAL CONSTITUTIONAL PROVISIONS INVOLVED

1. Article III of the United States Constitution provides in pertinent part:

> Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. The Fifth Amendment to the United States Constitution provides, in addition to the portion quoted in the petition for certiorari:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

STATEMENT OF THE CASE

Respondent was prosecuted for a violation of 18 U.S.C. 922(h). Statements he had made to two agents of the Bureau of Alcohol, Tobacco and Firearms were needed by the Government to prove essential elements of its case. Prior to trial, respondent moved to suppress these statements on the grounds that they were involuntary and obtained in violation of his Fifth Amendment rights. The district judge, over objection, referred the motion to a magistrate for hearing.

At the hearing before the magistrate, inconsistent testimony concerning critical events was given by respondent and the two agents.[1/] An assessment of the credibility of these witnesses was determinative of the motion. The parties submitted conflicting proposed findings of fact. The magistrate recommended that the Government's proposed findings of fact be adopted and wrote a brief, conclusory report in which he stated that he found the agents "more credible" than respondent.

Without hearing any testimony, the district court adopted the Government's proposed findings of fact, overruled respondent's objections and denied the motion to suppress. There being no contested issues of fact apart from those involved in the motion to suppress, respondent was tried by the court on an evidentiary stipulation. His conviction followed.

The Court of Appeals for the Seventh Circuit reversed respondent's conviction and remanded the case for a hearing on the motion to suppress before the district court at which the court could assess the credibility of the witnesses. The court of appeals thoroughly reviewed the record which had been before the district court and concluded that "the truth cannot be derived from this written record without an intolerably high margin of error . . . ." 592 F.2d at 984. The court held that because of the importance of credibility to the decision of this motion to suppress, the district court could not reliably fulfill its statutory responsibility to make a de novo determination of the motion without holding a hearing on contested factual issues. 592 F.2d at 986.

REASONS FOR DENYING THE WRIT

The court of appeals' decision was narrow in scope and carefully tailored to the facts of this case. The court upheld the constitutionality of the Magistrates Act's provisions permitting magistrates to conduct hearings on motions to suppress. It did not hold that de novo review, as required by the Magistrates Act, invariably requires the hearing of evidence by the district court. See 592 F.2d at 982 n.4. Rather, noting that "Congress did not require the trial court to determine this case on the basis of a written record alone," the court held only "that the district court cannot constitutionally exercise its discretion to refuse to hold a hearing on contested issues of fact in a criminal case where credibility is crucial to the outcome." 592 F.2d at 986 (emphasis added).

The court of appeals' decision is in full accord with principles of due process repeatedly stated by this Court. Contrary to the Government's contention, the court of appeals'

1/ The Government has omitted from its statement of the case the contradictions between the testimony given by each of the agents, the internal inconsistencies in their testimony and many of the details upon which the agents corroborated respondent's testimony. These problems in the evidence are described in the opinion of the court of appeals, reported at 592 F.2d 976, 977-979.

holding does not create a conflict among the circuits. Moreover, the legislative history indicates that the court of appeals' holding is consistent with the expectations of the framers of the Magistrates Act.

The standards for the exercise of a trial judge's discretion to hear evidence himself in deciding a motion to suppress initially heard by a magistrate can best be defined by district courts and courts of appeals as they gain experience working on a case-by-case basis with the actual records generated by magistrates.

I.

INTERVENTION BY THIS COURT IN ITS SUPERVISORY CAPACITY IS NOT WARRANTED

In its statement of the Question Presented and throughout its petition, the Government implies that the presence of crucial issues of credibility in this case was not essential to the court of appeals' holding. (Pet. at 2, 10.) The Government is in error. The court of appeals squarely upheld the constitutionality of the provisions of the Magistrates Act which permit magistrates to conduct hearings on motions to suppress. But it held in addition, as a matter of due process, that when a motion to suppress raises critical issues of credibility that cannot be determined from a cold record, the district judge must exercise his statutory authority to hear relevant testimony himself. 592 F.2d at 986. This holding is unassailably correct. This Court has repeatedly stated that even outside the context of judicial proceedings, where credibility is crucial to the resolution of disputed factual issues, the opportunity to observe the witnesses is

indispensable. See, e.g., Califano v. Yamasaki, No. 77-1511 (June 20, 1979), slip op. at 13-14; Goldberg v. Kelly, 397 U.S. 254, 269 (1970). See also Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); United States v. Oregon State Medical Society, 343 U.S. 326, 339 (1952); United States v. Yellow Cab Co., 338 U.S. 338, 341 (1949).

The Government argues that the factfinding method employed by the district court in this case is adequate since the procedural requirements for a suppression hearing are "less elaborate" than the procedural requirements for the trial on the issue of guilt. (Pet. at 15.) This argument is not well-taken. Nothing in the authorities cited by the Government sanctions a compromise in the integrity of the factfinding process even remotely comparable to an assessment of credibility from a cold record.[2/]

The Government's theory is that the judge need not find the facts with the level of confidence he would have were he the factfinder of first instance because the magistrate has seen and heard the witnesses. This theory ignores the Magistrates Act's express requirement that the district court make a de novo determination of portions of the magistrate's report or findings to which objection is made. 28 U.S.C. §636(b)(1)(B). Section

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2/ In Lego v. Twomey, 404 U.S. 477, 488-489 (1972), this Court expressly noted that the reliability of suppression rulings was not compromised by use of a preponderance of the evidence standard. The standard of proof determines where the inevitable risk of error in litigation will fall. It does not, like a procedure which deprives the decisionmaker of the source of evidence most relevant to his determination of credibility, vastly expand the risk of error. Similarly, in United States v. Matlock, 415 U.S. 164, 175-177 (1974) and McCray v. Illinois, 386 U.S. 300, 307-308, 313 (1967), this Court upheld the application of traditional evidentiary practices in part because it found that they did not impair the reliability of the factfinding process.

636(b)(1)(B) makes the district judge - not the magistrate - the decisionmaker. The court of appeals has done nothing more than uphold this clear statutory mandate and require that it be exercised, where credibility is critical, in compliance with established principles of due process.

II.

THE ALLEGED CONFLICT AMONG THE CIRCUITS IS ILLUSORY

The Government asserts that the decision of the Seventh Circuit conflicts with decisions of the Fifth Circuit in United States v. Whitmire, 595 F.2d 1303 (5th Cir. 1979), and the Ninth Circuit in Campbell v. United States District Court, 501 F.2d 196 (9th Cir.), cert. denied, 419 U.S. 979 (1974). An examination of these cases shows that neither addressed the problem of credibility on which the decision of the court of appeals in this case was premised.

The Seventh Circuit's decision is limited to motions to suppress involving factual disputes "where credibility is crucial to the outcome." 592 F.2d at 986. The motion to suppress in Whitmire was resolved solely on a question of law: whether customs agents were justified in boarding a docked vessel on the basis of facts not amounting to probable cause. 595 F.2d at 1315-1316. There is no indication in the Fifth Circuit's opinion that there was any dispute as to the underlying facts, let alone a dispositive credibility conflict.

The Campbell case went to the Ninth Circuit on a petition for a writ of mandamus to restrain the reference of a motion to suppress to a magistrate. The case was thus decided without any factual record. 501 F.2d at 200, 207. The due process problem that arises when credibility is

critical to the determination of a motion was thus not present in that case and was not addressed by the court.3/

The Ninth Circuit confronted the issue of fact-finding under the Magistrates Act only later, in United States v. Bergera, 512 F.2d 391 (9th Cir. 1975). There, the district court, after record review of a suppression hearing before a magistrate, rejected the magistrate's recommendation that the motion to suppress be granted. The Ninth Circuit reversed, holding that the district court, unless it relies on the magistrate's assessment of the facts, must rehear the evidence to insure "that any decision on the facts will be the result of first-hand observation of witnesses and evidence." 512 F.2d at 393. Based on the same due process principles which guided the Seventh Circuit's decision here, Bergera prohibited a judge from entering an order inconsistent with a magistrate's recommendation unless the judge himself heard the evidence on the motion to suppress. 512 F.2d at 392.

One year after Bergera was decided, Congress enacted the Magistrates Act amendments which governed the reference in this case. In those amendments, Congress for the first time expressly required the district court to make a de novo determination of contested portions of the magistrate's report. The amendments stated clearly, contrary to Bergera, that whether or not he rehears any evidence, the judge is free to "accept, reject or modify" the findings or recommendations of the magistrate. 28 U.S.C. §636(b)(1)(B). As the Seventh Circuit observed, Congress' mandate that the judge make a de novo

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3/ The Ninth Circuit, while leaving the method of review of a magistrate's recommendation to the district judge's discretion, specifically provided that the judge had the power to recall witnesses if a credibility issue arose, 501 F.2d at 206, and suggested that his ability to do so would meet "the problem of the credibility of witnesses." 501 F.2d at 205.

determination of the motion is incompatible with the degree of deference Bergera required. 592 F.2d at 984 n.9.

The decision of the court of appeals in this case was limited to a particular kind of fact situation. Neither of the cases which the Government cites as in conflict with this decision involved the credibility problem which is the basis for the court of appeals' ruling.

III.

THE DECISION OF THE COURT OF APPEALS WILL NOT IMPOSE A SUBSTANTIAL ADDITIONAL BURDEN ON THE FEDERAL COURTS OR LESSEN THE IMPORTANCE OR USEFULNESS OF MAGISTRATES IN THE ADMINISTRATION OF JUSTICE

The Government contends that the decision of the court of appeals will impose a substantial, additional burden on the federal courts and diminish the role of magistrates in the administration of justice. In support of this contention, the Government cites statistics from the 1978 Annual Report of the Director of the Administrative Office of the United States Courts. The Report does not reveal, however, what percentage of the §636(b)(1)(B) matters shown by its statistics to have been handled by magistrates during 1978 involved evidentiary hearings, what percentage of those matters resulted in appeals to the judge on disputed factual issues or how often district judges heard evidence themselves in order to resolve factual disputes. The procedure required by the court of appeals here may already be the accepted practice in many districts. One informed commentator has stated, "In some specific instances it may be necessary for the judge to . . . recall witnesses . . . if, for example, the judge finds that there is a problem as to the credibility of a witness or witnesses in an adversary proceeding." Honorable Morey L. Sear, Supporting Personnel, in Proceedings of Seminar for Newly Appointed United States District Judges, 75 F.R.D. 89, 257 (Sept. 13-18, 1976). Two circuits

which had held, prior to this Court's contrary decision in Wingo v. Wedding, 418 U.S. 461 (1974), that magistrates could hold evidentiary hearings in post-conviction cases, also held that the district judge had to rehear evidence relevant to disputed factual issues. See O'Shea v. United States, 491 F.2d 774, 778 (1st Cir. 1974); Noorlander v. Ciccone, 489 F.2d 642, 648-649 (8th Cir. 1943).

The express requirement that the district court make a de novo determination of contested portions of a magistrate's report or findings was suggested by the Judicial Conference. H. R. Rep. No. 94-1609, 94th Cong., 2d Sess., reprinted in [1976] U.S. Code Cong. & Ad. News 6162. The purpose of the Judicial Conference's recommendation was to avoid any possible conflict with Article III of the Constitution. See Jurisdiction of United States Magistrates: Hearing on S.1283 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 35 (July 16, 1975) (Hereinafter, "Hearings"). The Judicial Conference anticipated that this provision would require some duplication of effort in particular cases but judged that as the quality of magistrate appointments improved and as the bar gained confidence in the system, the number of appeals would diminish. Hearings, supra, at 35-37. The Judicial Conference relied on time and experience to prove the effectiveness of the system, not depriving parties of their ability to obtain a determination of case-dispositive motions by an Article III judge. Their expectation that the Magistrates Act would nevertheless be a substantial aid to the federal courts belies the Government's contention that the decision of the court of appeals will have an untoward impact on the administration of justice which requires this Court's intervention.

Section 636(b)(1)(B) authorizes the district court to hear testimony itself. The legislative history indicates

that Congress anticipated that this authority might properly be exercised where witness credibility was at issue. See H. R. Rep. No. 94-1609, supra at 6163. The court of appeals has announced a holding focused directly and narrowly on this precise problem of witness credibility. The decision is consistent with the expectation of the Act's framers and properly construes the Act in the particular circumstances of this case.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for certiorari should be denied.

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